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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 174

FREDERICK SNARE CORPORATION,

Petitioner,

against

VIGO STEAMSHIP CORPORATION and
MARSHIP CORPORATION OF MONROVIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Petitioner,

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VIGO STEAMSHIP CORPORATION and MARSHIP CORPORATION OF MONROVIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

The petitioner Frederick Snare Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered on February 19, 1970.

Opinions Below

The opinions of the New York Court of Appeals, reported at 26 N.Y. 2d 157 (1970), and of the Supreme Court of the State of New York, Appellate Division, First Department, reported at 32 A.D. 2d 10 (1969) and 299 N.Y.S. 2d 200, appear in the Appendix hereto.

Jurisdiction

The judgment of the New York Court of Appeals was made on February 19, 1970, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S. Code §1254(3).

Questions Presented

1. Whether a State may, under its procedural statute, order consolidation of arbitration proceedings arising under the Federal Arbitration Act (9 U.S.C. §1 *et seq.*)?

2. Whether such a holding would do violence to the prevailing Federal view that arbitration proceedings involving maritime contracts may not be consolidated?

Statutory Provisions Involved

United States Code, Title 9:

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or

foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§4. Failure to arbitrate under agreement; petition to United States Courts having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure,

or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

New York's Civil Practice Law and Rules:

§7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate

(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is

barred by limitation under subdivision (b) of section 7502.

(c) Notice of intention to arbitrate. A party may serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within ten days after service upon him of the notice or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.

Statement of the Case

On July 25, 1966, respondent Vigo Steamship Corporation ("Vigo") entered into a time charter with respondent Marship Corporation of Monrovia ("Marship"), the owner of the vessel M/V Nicholas Maris, for a period of at least twelve but not more than fifteen months. The arbitration clause contained within the time charter provided:

> "Should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so

chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Vigo took possession of the vessel in October, 1966.

Thereafter, on May 15, 1967, Vigo, as Time Charter Owner, entered into a voyage charter with the petitioner, Frederick Snare Corporation ("Snare"), for the transport of cargo. The voyage charter contained an arbitration clause identical to the one contained in the time charter between Marship and Vigo.

Snare employed the vessel for the carriage of bulk sand, rock and aggregate beginning in May, 1967 and ending in November, 1967. Controversies arose upon completion of the voyage charter when the vessel was returned to Vigo and was then returned by Vigo to Marship. Marship claimed that Vigo was liable for some $335,000 in damages to the vessel and demanded arbitration of the claim. Marship named its arbitrator according to the provisions of the time charter; Vigo then demanded arbitration with Snare, claiming that, if Vigo were liable for such damages to Marship, then Snare would be liable to Vigo since the damages claimed by Marship were allegedly incurred during Snare's voyage charter.

Vigo commenced this proceeding in the Supreme Court of the State of New York, New York County, Special Term, for an order pursuant to New York's Civil Practice Law and Rules section 7503, compelling Snare to appoint an arbitrator and proceed to a consolidated arbitration with Vigo and Marship. Snare cross-moved for an order di-

recting Vigo to appoint an arbitrator and proceed to arbitration *alone* with Snare, in accordance with the terms of the arbitration clause contained in their voyage charter party. Snare argued that, since there was no privity of contract between Marship and Snare, it should not be compelled to submit to a consolidated arbitration. The Special Term granted Vigo's motion for a consolidated arbitration and denied Snare's cross-motion for a separate arbitration.

On appeal to the Supreme Court of the State of New York, Appellate Division, First Department, the order appealed from was reversed, Vigo's petition was denied and Snare's cross-motion was granted [32 A.D.2d 10 (1969)].

Thereafter, Vigo appealed to the New York Court of Appeals, which reversed the Appellate Division and remitted the matter to the Special Term. The Court of Appeals held that although the contracts among the parties involved maritime matters, the sole issue involved was *procedural* in nature and its resolution was not in any way determinative of the outcome of the disputes on the merits, therefore the provisions of New York's Civil Practice Law and Rules were applicable to the controversy and there was no basis upon which to predicate a holding that Federal law applies; and, that even assuming the applicability of Federal law to the issue of consolidation, it was not clear that the Federal courts would be powerless to or would refuse to order consolidation [26 N.Y. 2d 157 (1970)].

Reasons for Granting the Writ

The decision of the State court is inimical to a long established principle of maritime law proscribing consolidation of arbitration proceedings; therefore, if this decision is allowed to stand, it will undermine national uniformity in matters involving maritime law and interstate commerce, and will encourage forum shopping.

It is a basic principle, in our system of jurisprudence, that the maritime law of this nation is exclusively construed by the Federal courts. The prime reason for seeking certiorari in this case, therefore, is an unprecedented ruling in a State court that an order to consolidate arbitration proceedings, under two unrelated charter parties involving foreign commerce, is a procedural matter without the ambit of Federal law. The Federal courts, on the other hand, have repeatedly held that agreements to arbitrate in maritime contracts are within the contemplation of the United States Arbitration Act [9 U. S. Code §§1 through 4] [*Orion Shipping & Trading Corp.* v. *Eastern States Petroleum Corp. of Panama*, 284 Fed. 2d 419, 421 (2d Cir. 1960)]; these agreements are part of the fabric of substantive maritime law [*Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967); *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2nd Cir. 1959), *cert. granted*, 362 U. S. 909 (1960), *dismissed under Rule 60*, 364 U. S. 801 (1960)]; and, such agreements are not subject to consolidation [*Greenwich Marine, Inc.* v. *S.S. Alexandria, et al.*, 225 F. Supp. 671 (S.D.N.Y. 1964); *aff'd other grounds* 339 F. 2d 901 (2nd Cir. 1965); *Industria E. Comercio De Minerios* v. *Nova Genuesis etc.*, 172 F. Supp. 569 (E.D. Va. 1959), *aff'd* 310 F. 2d 811 (4th Cir.

1962); *Instituto Cubano De Establizacion Del Azucar* v. *The Golden West*, 128 F. Supp. 754 (S.D.N.Y. 1955), *aff'd* 246 F. 2d 802 (2nd Cir. 1957), *cert. denied* 355 U. S. 884 (1957); *Silet Compania De Vapores, S.A.* v. *Luria Brothers & Company, Inc.* (USDC SDNY Docket No. 63 ADM. 523; September 9, 1963); *Compania Maritima Hari Limitada* v. *Luria Brothers & Company, Inc.* (USDC SDNY Docket No. 63 ADM. 524; September 9, 1963)].

It is submitted that the New York Court of Appeals was in error when it held that the question regarding consolidation of arbitration proceedings under separate maritime contracts is a procedural one, to be determined under applicable State law. To the contrary, this Court has held that the remedy of arbitration substantially affects the maritime cause of action [*Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198 (1955)] and that State courts cannot modify the substantive maritime law [*Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109 (1924)]. In the case at bar, the State court attempted to change the established substantive maritime law, not to supplement it.

The Federal courts have repeatedly refused to consolidate arbitration proceedings arising from maritime contracts. In *Greenwich Marine, Inc.* v. *S.S. Alexandria et al., supra,* the United States District Court had occasion to pass upon the very same issue. In that case, Greenwich Marine, Inc. ("Greenwich") had chartered the S.S. Alexandria from her owners, Fidelity Shipping Company ("Fidelity"), for a voyage from Albany to the United Arab Republic; the charter party contained an arbitration clause providing that all disputes between Green-

wich and Fidelity shall be submitted to arbitration in New York. On the same date, Greenwich sub-chartered the S.S. Alexandria to the Ministry of Supply of the United Arab Republic ("Ministry"); the sub-charter contained a similar arbitration clause providing that all disputes between Greenwich and Ministry must also be submitted to arbitration in New York.

The vessel then embarked upon and completed her voyage, as a result of which certain disputes arose. Greenwich demanded arbitration of its disputes with Ministry and appointed an arbitrator. Thereafter, Greenwich demanded arbitration with Fidelity, alleging that if Greenwich is found liable to the Ministry, then Fidelity should be liable to Greenwich. In order to enforce its demands, Greenwich filed a libel and petition pursuant to the United States Arbitration Act for an order directing arbitration and consolidation of the arbitration proceedings.

The District Court held that the dispute between the Ministry and Greenwich must be arbitrated separately from the dispute between Greenwich and Fidelity. In deciding against a consolidated arbitration, the court ruled as follows:

> "The two charterparties are separate and distinct and the arbitrations to be conducted thereunder are, unless otherwise agreed or determined by the arbitrators separate and distinct.
>
> "It would appear sensible by agreement of the parties or the arbitrators to conduct the two arbitrations at the same time. *This Court ought not, however, compel such a result and if its failure to do so leads to a duplication and the risk of conflicting awards, these consequences flow from the signature by Greenwich Marine of two separate and distinct charterparties.*" [225 F.2d Supp. 676] [Emphasis supplied]

The holding of *Greenwich* is apposite to the case at bar because of the similarity of facts. In both cases there were three separate parties, to wit, the vessel owner, the charterer and the sub-charterer. Moreover, Greenwich sub-chartered the vessel to the Ministry *on the same day.* In the case at bar, however, respondent Vigo sub-chartered the vessel to petitioner Snare approximately seven months after Vigo had acquired possession and use of the vessel. Therefore, the facts in the instant case are far stronger in militating against consolidation.

An other case closely in point is *Instituto Cubano De Establizacion Del Azucar* v. *The Golden West, supra.* In that case, the respondent shipowner chartered its vessel to a charterer, who sub-chartered the vessel and issued bills of lading to the libellant shipper. Both the charter and sub-charter contained agreements to arbitrate; the bills of lading stated that the terms of the charter applied to the shipment. The shipowner was not a party to the sub-charter.

The libellant shipper brought suit to compel the owner to arbitrate with it; the District Court refused to do so: On appeal, in affirming, the Court of Appeals of the Second Circuit stated:

> "The district judge denied the motion to compel Skibs A/S Golden West (the vessel owner) to proceed with arbitration. He held that such a substitution was unwarranted; for, although the bills of lading issued by the owner's master may have made the owner liable for any shortage in the shipment upon delivery, *the owner was not a party to any Charter incorporated in*

the bills of lading that provided for submission of shortage claims to arbitration." [246 F. 2d at 804]. [Emphasis supplied.]

Here, too, the Federal courts refused to compel arbitration between parties not in contractual privity.

Of significance here in demonstrating the error of the New York Court of Appeals is the decision of Federal District Court Judge Croake in the companion cases of *Silet Compania De Vapores, S.A.* v. *Luria Brothers & Company, Inc., supra,* and *Compania Maritima Hari Limitada* v. *Luria Brothers & Company, Inc., supra,* wherein he granted petitioners' motions to compel arbitration but denied the application for consolidation of arbitration stating as follows:

> "Though the desire of the petitioner to consolidate the disputes to be heard and determined by the same panel of arbitrators is reasonable, the matter should be determined by the parties and not by order of the Court. Accordingly, the motions for an order directing consolidation are denied."

To the same effect, see *Industria E. Comercio De Minerios* v. *Nova Genuesis, etc., supra,* wherein the court held:

> "While ICOMI was the shipper of the cargo, it was not a party to the charter party and it is abundantly clear from the authorities that arbitration cannot be required of those who were not parties to the agreement, either directly or through their agents. Instituto Cubano De Establizacion Del Azucar v. T/V Golden West, 2nd Cir., 246 F. 2d 802, certiorari denied 355 U. S. 884, 78 S. Ct. 152, 2 L. Ed. 2d 114" [*Industria, supra,* p. 576].

Thus, it can be seen from the foregoing cases that, under the maritime law of the United States, the Federal courts will not consolidate arbitration in maritime contracts nor order arbitration when there is no contractual privity between the parties. The decision by the State Court of Appeals, in the case at bar, is contrary to the foregoing Federal cases. This, in effect, constitutes an attempt to change the maritime law, clearly a constitutionally impermissible result.

Beyond this compelling point of a State court attempting to graft its own views upon the body of national maritime law, and a further reason for the granting of certiorari, is the fact that the present decision will give litigants different results in the State courts of New York *vis-á-vis* the Federal courts; a result proscribed since *Erie* v. *Thompkins* [304 U. S. 64 (1938)]. [*Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198 (1955); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945).]

Moreover, the holding in the instant case is wholly inconsistent with the State court's decision rendered a month earlier in *Matter of Rederi* [*Dow Chem. Co.*] [25 N.Y. 2d 576 (1970)]. In *Rederi*, the charter party contained an arbitration clause substantially identical to the case at bar. When disputes arose, the petitioner demanded arbitration. The respondent moved to stay the arbitration in the State courts, pursuant to the New York Civil Practice Law and Rules section 7502(b), on the ground that the disputes were time barred under the Federal Carriage of Goods by Sea Act [46 U.S. Code §1303(b)]. Speaking for a majority of the court (Judge Burke, who wrote the opinion in the case at bar, was the only dissenting Judge in *Rederi, supra*), Chief Judge Fuld wrote:

> "The appellant takes the position that CPLR (subd. 7502[b])—which permits a court to stay arbitration if

the dispute is barred by a limitation of time—does not substantially alter any federally created substantive rights. Its argument is premised upon the assumption that arbitration is a mere procedural device and that any court is free to prevent enforcement of an arbitration clause according to the particular law of the forum. This is refuted by section 2 of the F.A.A. itself, which provides that a written provision for arbitration 'in any *maritime transaction* or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' Here, in unmistakable language, is evidence of the Congressional design that the arbitration clause in a maritime contract accords a Federal right to arbitration as a matter of Federal law, wholly apart from any provisions of the CPLR. * * *

* * *

"This reasoning would apply even if the Supremacy Clause did not require us to conform to, and apply, the provisions of the Federal statute. Any other conclusion, we suggest would place the court's stamp of approval on a particularly offensive form of forum shopping. If the appellant had sought a stay of arbitration in the District Court for the Southern District of New York, it would unquestionably have been denied. Despite this, the petitioner would have us grant its petition, and deny arbitration of a question wholly unrelated to New York interests, merely because it was filed in the State Supreme Court just across the street from the Federal District Court." [*Rederi, supra*, pp. 581, 584-5].

There is no doubt, just like Chief Judge Fuld stated above, that if the petition to consolidate, in the case at bar, was filed in the District Court for the Southern District of New York, a *different* result would have obtained. This is

evidenced by the fact that in cases such as *Greenwich Marine, supra, Silet Compania De Vapores, S.A. v. Luria Brothers & Company, Inc., supra,* and *Compania Maritima Hari Limitada v. Luria Brothers & Company, Inc., supra,* where the facts in favor of consolidation were far more compelling, the Federal court refused to order such consolidation. It is clear, from even a casual reading of these decisions, that the Federal judges felt themselves unwilling to compel parties, having no contractual privity, to submit to a consolidated arbitration.

It should be noted that the appellant in *Rederi,* has petitioned the Court this Term for a writ of certiorari under case number 1450. These conflicting interpretations of the Federal Arbitration Act by the same State court, during the same Term, are yet another reason for this Court to exercise its discretion to review the present case.

In sum, if the decision of the New York Court of Appeals, inconsistent with its recent earlier holding, is allowed to stand, the State court has altered the maritime law in New York, a result proscribed by this Court; thus litigants will be able to obtain different results in the State courts of New York *vis-á-vis* the Federal courts of New York, or elsewhere, clearly an impermissible situation.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX

Opinion of the New York Court of Appeals

BURKE, J. On July 25, 1966, the petitioner, Vigo Steamship Corporation ("Vigo"), entered into a Time Charter with the Marship Corporation of Monrovia ("Marship"), the owner of the M/V *Nicholas Maris*, for a period of at least 12 but not more than 15 months. The Time Charter provided that "should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men." On May 15, 1967, Vigo, as Time Charter Owner, entered into a Voyage Charter with the respondent Frederick Snare Corporation ("Snare"), for the transport of certain cargo. The Voyage Charter contained an arbitration clause identical to the one contained in the Time Charter between Marship and Vigo. Vigo took possession of the ship in October, 1966 and Snare employed the ship for the carriage of bulk sand, rock and aggregate beginning in May, 1967 and ending in November, 1967. Controversies arose upon completion of the Voyage Charter when the ship was returned to Vigo and was then returned by Vigo to Marship. Marship claimed that Vigo was liable for some $335,000 in damages to the ship and demanded arbitration of the claim. Marship named its arbitrator according to the provisions of the Time Charter. Vigo then demanded arbitration with Snare, claiming that,

if Vigo were liable for such damages to Marship, then Snare would be liable to Vigo since Vigo alleged that the damages claimed by Marship were incurred during Snare's Voyage Charter and Snare was, therefore, responsible for them. Vigo also agreed to accept the arbitrator named by Marship as its own.

Vigo moved below for a consolidation of the arbitrations among the three parties on the ground that both arbitrations (Marship-Vigo and Vigo-Snare) concerned common questions of law and fact. Snare cross-moved to compel a separate arbitration between it and Vigo upon the ground that a consolidated arbitration would prejudice its substantial rights. Special Term granted Vigo's motion for consolidation and expressly found that no prejudice would result to Snare by such consolidation. A closely divided Appellate Division reversed and ordered separate arbitrations. (32 A D 2d 10.) The majority accepted Snare's contention that there were different issues involved in the arbitrations ordered consolidated by Special Term and that the possibility of confusion on the part of the "commercial men" to be designated as arbitrators would substantially prejudice its rights. The majority also apparently held in the alternative that, since the contracts involved maritime matters, they should be governed by Federal law, in the application of which the Federal courts have purportedly "consistently refused" to order consolidation. The dissenters disagreed on both grounds.

The order of the Appellate Division should be reversed upon the ground that Special Term properly exercised its discretion in granting the motion to consolidate since Snare

failed to sustain its burden of demonstrating that prejudice would result therefrom. That there are common questions of law and fact involved in the two disputes is clear from the very allegations of Vigo's petition and Snare's response to it. Snare sought to demonstrate the lack of such common questions by pointing out that Vigo had voyage chartered the vessel to others prior to the period of Snare's Voyage Charter and that, therefore, it would be forced to defend itself with respect to matters of which it is ignorant and with a party, Marship, with whom it had no privity. However, Vigo's petition specifically alleges that "Marship has made claim against Vigo in the amount of $335,000 for damage done to the vessel during the carriage of said cargo, [the cargo carried by Snare during its Voyage Charter, as alleged in the preceding paragraph] and Vigo alleges that if it should be considered responsible and liable for such damage in the said amount, that Snare is liable to Vigo." Snare, in its answer to the petition, denied only so much of that paragraph of the petition as alleged the conclusion that Snare would be liable over to Vigo for the amount of Vigo's liability to Marship. Snare did not, however, deny that part of the allegation which referred to the damages claimed by Marship *as those incurred during the carriage of the specified cargo by Snare*. There is, therefore, a plain identity between the issues involved in the two controversies, i.e., the amount of damages incurred during Snare's voyages and the respective liability for them of Vigo and Snare. The threshhold requirement for consolidation is, therefore, clearly present. The only issue then remaining lies in Snare's contention as to prejudice and the burden of establishing it was clearly not met. The

mere desire to have one's dispute heard separately does not, by itself, constitute a "substantial right". (*Matter of Symphony Fabrics Corp.*, [*Bernson Silk Mills*], 12 N Y 2d 409, 412.) Indeed, as we noted in the cited case as to an analogous issue, whether or not there is consolidation of the arbitrations, the issues of the extent of and liability for the damages to the ship will nevertheless be before the arbitrators and consolidation will make it possible to determine those issues in one proceeding involving all of the interested parties and to avoid the possibility of conflicting awards as well as the additional time and expense of separate proceedings. Moreover, the supposed risk of submitting the issues to "commercial men" is rather specious in light of the fact that *both* arbitration clauses specify that the arbitrators are to be "commercial men" and Snare has, accordingly, already agreed that such persons decide its dispute with Vigo. The existence of common issues having been clearly demonstrated and Snare having failed in its burden of demonstrating prejudice to a substantial right, Special Term properly exercised its broad discretion to order consolidation.

The alternative ground apparently relied upon by the Appellate Division requires comment. Although the contracts among the parties concededly involved maritime matters, the sole issue involved in the proceeding below in a State court was procedural in nature and its resolution is not in any way determinative of the outcome of the disputes on the merits since it merely involves the question whether two, rather than one, arbitration proceedings are to be used to decide common issues. (Cf. *Matter of Rederi*

[*Dow Chem. Co.*], 25 N Y 2d 576.) It is clear, therefore, that the provisions of the CPLR are applicable to the present controversy and there is no basis upon which to predicate a holding that Federal law controls. Furthermore, even assuming the applicability of Federal law to the issue of consolidation, it is not at all clear that the Federal courts would be powerless to or would refuse to order consolidation were they faced with this factual situation. Indeed, the contention as to a lack of power to do so flies in the face of the provisions of the Federal Rules of Civil Procedure. Rule 42 (subd. [a]) provides expressly for consolidation in situations involving common questions of law or fact and the Federal Rules generally are made applicable to the Federal Arbitration Act as to matters of procedure not covered by the latter (rule 81, subd. [a], par. [3]) and the Arbitration Act is silent as to the question of consolidating arbitration proceedings. There is thus explicit authority for such consolidation. In the face of such authority and the lack of apposite case law indicating that consolidation should not be ordered in a factual context such as the present, we cannot accept the contention that, assuming the applicability of Federal law, consolidation could not or would not be ordered by a Federal court. The order of the Appellate Division should be reversed and the order of Special Term reinstated.

Chief Judge FULD and Judges SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON concur.

Order reversed, with costs in this court and in the Appellate Division, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

Opinion of the Supreme Court of the State of New York, Appellate Division, First Department

McGIVERN, J. The moving party herein is the Vigo Steamship Corporation, which had chartered a vessel, by name, the *S.S. Nicholas Maris*, from the owner, the Marship Corporation of Monrovia; this was a "time charter". Seven months later, Vigo, the charterer, in turn chartered the vessel to the Frederick Snare Corporation. The latter was a "voyage charter." During the performance of these two separate charter commitments, controversies developed between Vigo and Snare and Vigo and Marship with respect to damages inflicted upon the vessel. In order to resolve these differences by arbitration, as provided for by the separate charter arrangements, Vigo has demanded that Snare name an arbitrator to act for both and proceed to a joint arbitration with all three parties contemporaneously. Snare is willing to appoint an arbitrator and proceed to arbitration with Vigo pursuant to its own charter agreement but recoils from participating in a consolidated arbitration also involving Marship, with which Snare is not in contractual privity. Special Term has issued an order compelling the consolidation. With this order we do not agree.

Although we appreciate the liberality with which New York courts are prone to consolidate actions in order to avoid circuitry and duplication of trials, that is not the question before us. Neither do we deal simply with the method of enforcement of agreements to arbitrate ordinary commercial disputes involving an identity of issues by parties privy thereto. (See *Matter of Chariot Textiles Corp.* [*Wannalancit Textile Co.—Kute Kiddies Coats*], 18 N Y 2d 793.) We have what is essentially a maritime matter

involving two charter parties separate and distinct, possessed of variances relating to both time and terms. The contract of Snare was with Vigo alone and the consolidation of the proceedings, as ordered by Special Term, would force Snare to arbitrate in a manner to which it did not agree and with a party with which it did not have any contractual relationship whatever concerning issues which are of no concern to it. This is not what Snare bargained for. Legitimately, Snare insists there are differences in the terms of the contracts pertaining to the two charter party arrangements: The degree of care, the state in which the vessel should be returned, the stevedore damage clauses, the terms relative to specific cargoes, and the different time periods of the respective contracts. And not unnaturally, Snare shrinks back from hazarding these subtle differences to "commercial men", untrained in the law, and to the possibility of sudden but irrevocable death at their hands as final arbitrators. The confusion that could result from such concurrent hearings, removed from judicial scrutiny, is appreciable. No less real is the apprehension of Snare that the legal obligations of Vigo to Marship could be imperceptibly transferred to Snare. Nor can Vigo complain. It was Vigo, and not Snare, which became signatory to two separate contracts going off in opposite directions at different times.

We recognize the power to consolidate, under certain circumstances which do no violence to the agreement of the parties. However, as was stated by the majority of this court in *Matter of Symphony Fabrics Corp. (Bernson Silk*

Mills) (16 A D 2d 473, 474, affd. 12 N Y 2d 409): "Circumstances would in each instance dictate whether a substantial right was being prejudiced". Here, unlike the *Symphony* case, where each of the contracts called for arbitration before the American Arbitration Association, and where selection of an arbitrator was limited under its rules to a selection from its skilled panel of arbitrators, the choice of an arbitrator in the instant case was limited to "commercial men". The susceptibility to prejudice incident to a confusion of issues by "commercial men" however knowledgeable, who might be chosen at random, deliberately or otherwise, as against confusion by a member of a skilled panel of arbitrators cognizant of, if not wholly bound by judicial guidelines, is obvious. Thus, we reach the major area of prejudice. Under the arbitration agreement covering the voyage charter of Snare the basic issue is: What was the *condition* of the ship *at the time it was turned over to Snare?* And at the time of the termination of this charter? The issue between Vigo and the owner relates to the condition of the ship when it was turned over to Vigo, and the extent of the damage done by intervening charterers, other than Snare. These issues are of no concern to Snare and with which he should not be embroiled. In this connection it may be noted that Vigo does not deny that others had chartered the vessel prior to the Snare charter. Participation by all three parties in a survey of the damage to and agreement with respect the cost of remedying such damage reaches neither the question of liability for this damage nor the circumstances under which

such liability may be founded. In *Symphony*, upon which the dissent relies, the court did not deal with a "maritime transaction", and in that case there was but a single basic issue, "the quality and suitability of the fabric", which was supplied by Bernson as vendor to Symphony as vendee, under an agreement that it "was to meet the same specifications" as the fabric which this vendee had agreed to supply as vendor under previous contract to Barbara as vendee. The Court of Appeals noted (p. 411): "The only two differences between the contracts were the price and the amount of fabric ordered". And, as the Court of Appeals further noted (p. 413): "That Symphony wishes to settle its differences with Barbara in the same proceeding should be of no moment to Bernson, since the *same witnesses would be called and the same testimony and evidence introduced, if Barbara were not a party*". (Emphasis supplied.)

Unlike the *Symphony* case, the witnesses and testimony and evidence requisite to proof of the condition of the ship at the time it was turned over to Snare and the circumstances creating liability for damage, if any, would be entirely different from such as would permit a foundation for liability by Vigo.

Furthermore, we deal with contracts of a maritime character, involving foreign commerce, which properly belong within that body of law developed by the Federal courts, which have consistently refused to compel parties who are not privy to arbitration agreements to arbitrate their disputes. (See *Greenwich Mar.* v. *S. S. Alexandria*, 225 F. Supp. 671, affd. on other grounds 339 F. 2d 901;

Instituto Cubano De Establizacion Del Azucar v. *T/V Golden West*, 128 F. Supp. 754 [U. S. Dist. Ct., S.D., N.Y., 1955], affd, 246 F. 2d 802 [C. A. 2d, 1957], cert. den. 355 U. S. 884 [1957]; *Industria E. Comercio De Minerios* v. *Nova Geanesis Societa*, 172 F. Supp. 569, affd. 310 F. 2d 811 [C. A. 4th, 1962]; *Matter of A/S Ganger Rolf* v. *Zeeland Transp., Ltd.*, 191 F. Supp. 359 [U. S. Dist. Ct., S. D., N.Y., 1961]; also *Prima Paint* v. *Flood & Conklin*, 388 U. S. 395, 405 [1967]; *Matter of Rederi* [*Dow Chem. Co.*], 31 A D 2d 372.) In any event, the relinquishment of rights to complete judicial scrutiny incident to an agreement to arbitrate and the drastic restriction of judicial scrutiny of an award in arbitration, pursuant to the provisions of article 75 of the CPLR, require strict adherence to the provisions of the agreement under which such rights are relinquished, particularly where it appears that a substantial right would be prejudiced by enforced consolidation.

Accordingly, we would reverse on the law and on the facts, with costs and disbursements, and deny movant's petition, grant the cross motion, and direct the petitioner to appoint an arbitrator on its own behalf and proceed to arbitration with the respondent Snare.

Steuer, J. (dissenting). Marship Corporation, owner of the *M/V Nicholas Maris*, leased the ship to Vigo Steamship Corporation on a time charter. During the term of the charter, Vigo leased the ship to Frederick Snare Corporation on a voyage charter. During the voyage the vessel suffered severe damage. All three parties participated in a survey of the damage by independent surveyors and all

parties agreed that the damage so done amounted to $335,000. Both charter parties contained arbitration clauses. According to both, arbitration was to be by three arbitrators, one chosen by each party and a third selected by the two so chosen.

Marship demanded arbitration against Vigo and Vigo demanded arbitration against Snare. Following the demands, Vigo moved to consolidate the arbitrations. Marship raised no objection. Snare opposed the application and, upon its being granted, takes this appeal. The specifications of error are that Snare is being compelled to arbitrate against Marship, a party with whom it has no contractual relationship; that in a consolidated proceeding the arbitrators would be prone to error; and that the arbitrations are governed by the Federal Arbitration Act (U. S. Code, tit. 9, §1 *et seq.*) which does not allow consolidation.

We do not regard any of these contentions as well taken and believe that Special Term was entirely correct in granting the application. Snare is not being compelled to arbitrate with Marship. Whether or not Marship prevails against Vigo under the contract between them can have no effect on whether Vigo would be entitled to recover against Snare, and the presence of all three in the same proceeding does not affect this. It may well be that Vigo will concede liability to Marship as indicated by its professed intention to select as its arbitrator in the proceeding against Snare whatever person is designated by Marship as Marship's arbitrator in its claim against Vigo. This is hardly a ground of objection; in fact, it will remove a ground of

objection. If Vigo concedes its liability it cannot be said that the arbitrators would be confused by any distinction in the two charter parties.

It was conceded on argument that, if the parties had proceeded by way of actions at law rather than arbitration, the resulting lawsuits would have been consolidated and that pragmatic considerations would make any other disposition an abuse of discretion. As we allow consolidation of arbitrations under similar circumstances where no substantial consideration intervenes (*Matter of Symphony Fabrics Corp.* [*Bernson Silk Mills*], 12 N Y 2d 409), it should follow that, unless there is some overriding objection, it should be granted here.

It is claimed that there is such an overriding objection. These being maritime contracts, the right to enforce arbitration rests on Federal law, specifically the Federal Arbitration Act. It is further claimed that under that act consolidation of arbitration proceedings is not permissible. Nothing in the act itself mandates that conclusion. It is argued that the Federal courts have on certain occasions denied applications for consolidation. However, in no such instance, as reported, has the denial been based on the ground that consolidation is forbidden, but rather on the ground that the particular facts involved did not warrant a resort to that procedure.

Even assuming that practice in the Federal courts does not countenance consolidation of arbitration proceedings, that situation would not be determinative of the instant application. It is now not subject to controversy that in maritime matters where judgment *in pais* is sought and the

decision would not involve an inroad on the adminstration of maritime law, State courts have concurrent jurisdiction (*Romero* v. *International Term. Co.*, 358 U. S. 354, 373). And the procedures, including the availability of arbitration, are such as the State law provides (*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, revg. 233 N.Y. 373). It follows that as to matters of procedure State law governs.

The order should be affirmed.

EAGER, J. P., and NUNEZ, J., concur with MCGIVERN, J.; STEUER, J., dissents in opinion in which MARKEWICH, J., concurs.

Order entered on October 22, 1968, reversed, on the law and on the facts, with $30 costs and disbursements to appellant, and movant's petition denied and the cross motion of respondent Frederick Snare Corporation granted; and petitioner is directed to appoint an arbitrator on its own behalf and to proceed to arbitration with the respondent Snare.

Opinion of the Supreme Court of the State of New York, New York County, Special Term

Upon the foregoing papers this motion by petitioner to compel arbitration pursuant to its respective contracts with the owners and voyage charterer of the ship, M/V Nicholas Maris, and for consolidation of the arbitration is granted. Cross-motion by the respondent, Frederick Snare Corporation, seeking to compel single arbitration is denied. The issues here relating to the damages caused the chartered vessel with the question of liability, therefore, are expeditiously and simply resolved by a consolidated arbitration with a minimum of legal expenses. No resulting prejudice is shown by the objecting respondent. The cases cited by the latter against consolidation are inapposite with the present situation. Murtaugh, J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 171

FREDERICK SNARE CORPORATION,

Petitioner,

against

VIGO STEAMSHIP CORPORATION and MARSHIP CORPORATION OF MONROVIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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